Regulating Composite Platform Economy Services: Examining the Applicable Legal Framework in Light of Recent Judicial Developments

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Numerous platform operators provide composite services comprising electronic and non-electronic elements, whose legal classification has been highly debated. This is partly explained by the fact that the EU law regime applicable to information society services (ISS) is far more favourable to businesses than that applicable to other types of services. The most recent case-law, however, has noticeably strengthened Member State regulatory prerogatives regarding ISS by, inter alia, giving a whole new meaning to the provisions of the E-commerce Directive. This twenty-year old legal act certainly needed reshuffling, but the Court's approach has created a high degree of uncertainty for Member States wishing to regulate ISS in compliance with their notification obligations. Further, the applicable legal framework fails to guarantee the freedom to provide composite platform economy services that classify as two independent services of offline and online nature. The present article presents the main takeaways from recent judgments and highlights the structural differences between the legal regime applicable to ISS and that applicable to other kind of services, as well as their shortcomings.

Keywords: Digital Single Market – Regulation of the platform economy – Composite services – notification – online platform liability – e-commerce – Digital Services Act – Directive 2000/31 – Directive 2015/1535 – Directive 2006/123

1 INTRODUCTION

With the ongoing digital revolution, a number of 'composite services',[1] 'comprising electronic and non-electronic elements',[2] have been emerging. Online sales have been

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1 Maciej Szpunar, *Reconciling new Technologies With Existing EU Law – Online Platforms as Information Society Service Providers*, Maastricht J. Eur. & Comp. L. 399 at 401 (2020).

2 Opinion of AG Szpunar in Case C-434/15, *Elite Taxi*, 11 May 2017, EU:C:2017:364, para. 33; *see also ibid.*, at 401.

Chapuis-Doppler, Augustin & Delhomme, Vincent, 'Regulating Composite Platform Economy Services: Examining the Applicable Legal Framework in Light of Recent Judicial Developments'. *Legal Issues of Economic Integration* 49, no. 1 (2022): 43–70.

booming, intermediation services – such as taxi, flight and hotel booking services – are increasingly available on the Internet, and collaborative economy platforms[3] have emerged in ride-hailing and short-term accommodation rental markets.

As it is not always clear whether such services should be considered purely electronic services, under EU law, this issue has been repeatedly brought to the Court of Justice over the past few years. In two cases regarding the infamous UberPop, the Court has found that there was an overall service, whose main element was a non-electronic supply.[4] In another case about the online sales of non-prescription drugs, the Court has arguably found that there was an overall service, whose main element was an electronic supply.[5] In other instances concerning, inter alia, the service provided by Airbnb, it has ruled that the electronic and non-electronic components at issue must be considered separately.[6] Therefore, as the case law stands, a composite service may be classified as either (1) an overall online service, (2) an overall offline service, or (3) two independent services of offline and online nature, respectively.[7]

Under the current legal framework, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services is an information society service (hereinafter 'ISS').[8] ISS fall within the scopes of the E-commerce Directive (hereinafter 'Directive 2000/31'[9]) and the Single Market Transparency Directive (hereinafter 'Directive 2015/1535'[10]).[11] As

[3] According to the European Commission, the term 'collaborative economy' refers to business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals; *see* Communication from the Commission of 2 June 2016, A European Agenda for the Collaborative Economy, COM(2016) 356 final, at 3. For issues relative to the legal challenges specifically posed by the collaborative economy platforms, *see* Vassilis Hatzopoulos, *The Collaborative Economy and EU Law* (Hart Publishing 2018).

[4] Case C-434/15, *Asociación Profesional Elite Taxi*, 20 Dec. 2017, EU:C:2017:981; Case C-320/16, *Uber France*, 10 Apr. 2018, EU:C:2018:221.

[5] Case C-649/18, *A (Advertising and sale of medicinal products online)*, 1 Oct. 2020, EU:C:2020:764.

[6] Case C-108/09, *Ker-Optika*, 2 Dec. 2010, EU:C:2010:725; C-390/18, *Airbnb Ireland*, 19 Dec. 2019, EU:C:2019:1112; and Case C-62/19, *Star Taxi App*, 3 Dec. 2020, EU:C:2020:980.

[7] *See* Augustin Chapuis-Doppler & Vincent Delhomme, *Regulating Composite Platform Economy Services: The State-of-Play After Airbnb Ireland*, 5 Eur. Papers 411 (2020); *see also* Augustin Chapuis-Doppler & Vincent Delhomme, *Affaire Publicité et vente de médicaments en ligne (C-649/18, A): la libéralisation de la publicité pour les professionnels de santé se poursuit*, REDC (2021).

[8] Article 1(1)(b), of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 Sept. 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services.

[9] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17 July 2000, at 1.

[10] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 Sept. 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17 Sept. 2015, at 1.

[11] Some ISS may also fall into legal acts that are *lex specialis* to Directive 2000/31. For instance, video-sharing platform providers provide ISS but are also covered by Directive 2010/13/EU of the European Parliament and of the Council of 10 Mar. 2010 on the coordination of certain provisions laid down by

Advocate General Maciej Szpunar puts it, 'to qualify an Internet platform as "an information society service provider" has potentially tremendous consequences'.[12]

In this regard, pursuant to Directive 2000/31, Member States where ISS providers are established may not subject the provision of such services to a prior authorization scheme that is 'specifically and exclusively targeted' at these services.[13] Further, Member States where ISS are provided from another Member State may only restrict the freedom to provide such services for a limited number of reasons pertaining to the general interest.[14] Also, Member States may not hold host providers that play a neutral role liable for the transmission and storage of illegal information, where such providers have no knowledge of the nature of that information or act expeditiously to remove it or to disable access to it, upon obtaining such knowledge or at the request of a public authority.[15] Moreover, Member States may not impose a general obligation on providers to monitor the information that they transmit or store, or a general obligation to actively seek facts or circumstances indicating illegal activity.[16] Finally, under Directive 2000/31 and Directive 2015/1535, national measures regulating ISS must be notified to the Commission and to other Member States.[17]

Offline services do not benefit from these favourable provisions. They may fall under the Services Directive (hereinafter 'Directive 2006/123'[18]) and the provisions of Title IV of the Treaty on the Functioning of the European Union (TFEU),[19] under which authorization requirements and restrictions to the freedom to provide services should, at least, be justified by the pursuit of a legitimate public interest objective.

In the previous two years, the Court has delivered seven significant judgments applying the key provisions of the directives mentioned above. In *Glawischnig-Piesczek*[20] (2019), the Court examined an injunction to take down identical and

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law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15 Apr. 2010, at 1–24. *See* Recit. 44 of Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 Nov. 2018 amending Directive 2010/13/EU in view of changing market realities, OJ L 303, 28 Nov. 2018, at 69–92.

12 Szpunar, *supra* n. 1, at 401.

13 Article 4 of Directive 2000/31.

14 Article 3(4)(a) of Directive 2000/31.

15 *See* Arts 12 to 14 of Directive 2000/31 for the three different situations of 'mere conduit', 'caching' and 'hosting'.

16 Article 15 of Directive 2000/31.

17 Article 5 of Directive 2015/1535 and Art. 3(4)(b) of Directive 2000/31.

18 Directive 2006/123/EC of the European Parliament and of the Council of 12 Dec. 2006 on services in the internal market, OJ L 376, 27 Dec. 2006, at 36.

19 Articles 49 to 55 TFEU (establishment) and Arts 56 to 62 TFEU (services). Services in the field of transport are subject to a specific set of provisions under the Treaty and in secondary legislation, *see* Art. 58(1) and Title VI TFEU.

20 Case C-18/18, *Glawischnig-Piesczek*, 3 Oct. 2019, EU:C:2019:821; *see also* Daphne Keller, *Facebook Filters, Fundamental Rights, and the CJEU's* Glawischnig-Piesczek *Ruling*, 69(6) GRUR Int'l 616–623 (2020).

similar content to a defamatory comment posted on Facebook, applying for the first time the provisions of Article 15 of Directive 2000/31 to a social media platform. In *YouTube*[21] (2021), the Court applied the same provisions to a national law imposing that copyright holders notify online content-sharing platforms that their rights had been infringed before applying for an injunction to take down. In *Airbnb Ireland*[22] (2019) and *A (Advertising and sale of medicinal products online)*[23] (2020) (hereinafter '*A*'), the Court gave a whole new meaning to the requirements that Directive 2000/31 imposes on Member States wishing to regulate ISS provided on their territory. In *VG Media*[24] (2019) and *Star Taxi App*[25] (2020), the Court examined what specific rules on services Member States should notify the Commission under Directive 2015/1535. Lastly, in *Cali Apartments*[26] (2020) and *Star Taxi App* the Court delivered the first detailed judgments on Articles 9 and 10 of Directive 2006/123, and Article 4 of Directive 2000/31, which regulate the authorization schemes Member States may impose on service providers.

Pending the Court's judgments in additional cases,[27] the aim of this article is to present the main takeaways from the aforementioned decisions, highlighting the main differences between the legal regime applicable to ISS and the legal regimes applicable to other kind of services, and analysing their relevance. It focuses on the procedural obligations imposed on Member States wishing to regulate services (2) and on the substantive requirements designed to guarantee operators' freedom to provide services and freedom of establishment in the internal market[28] (3).

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21 Joined cases C-682/18 et C-683/18, *YouTube and Cyando*, 22 June 2021, EU:C:2021:503.

22 Case C-390/18, *supra* n. 6; *see also* Augustin Chapuis-Doppler & Vincent Delhomme, *A Regulatory Conundrum in the Platform Economy, Case C-390/18 Airbnb Ireland*, European Law Blog; Liesbet Van Acker, *C-390/18 – The CJEU Finally Clears the Air(bnb) Regarding Information Society Services*, 9(2) EuCML 77–80 (2020); Pieter Van Cleynenbreugel, *Accommodating the Freedom of Online Platforms to Provide Services Through the Incidental Direct Effect Back Door: Airbnb Ireland*, 57 Common Mkt. L. Rev. 1201 (2020).

23 Case C-649/18, *supra* n. 5; *see also* Chapuis-Doppler & Delhomme, *Affaire Publicité et vente de médicaments en ligne (C-649/18, A)*, *supra* n. 7.

24 Case C-299/17, *VG Media*, 12 Sept. 2019, EU:C:2019:716.

25 C-62/19, *supra* n. 6; *see also* Augustin Chapuis-Doppler & Vincent Delhomme, *Member States May Subject the Activity of Ride-Hailing Platforms in Their Territory to Prior Authorisation: Star Taxi App (C-62/19)*, EU Law Live (2020); Caterina Gardiner, *Star Taxi Is an 'Information Society Service': But Is the Meter Still Running for the Classification of Platform Services?*, 10(2) EuCML 67–71 (2021).

26 Joined cases C-724/18 et C-727/18, *Cali Apartments*, 22 Sept. 2020, EU:C:2020:743.

27 Cases C-674/20 *Airbnb Ireland*, regarding Directives 2000/31 and 2006/123, as well as Art. 56 TFEU; C-83/21 *Airbnb Ireland and Airbnb Payments UK*, regarding also the Treaty and these directives, as well as Directive 2015/1535.

28 For requirements regarding the free of movement of goods and capital (not affected by recent judgments), *see* Pieter Van Cleynenbreugel, *Plateformes en ligne et droit de l'Union européenne*, Bruylant (2020), paras 319 and seq.

2 NOTIFICATION PROCEDURES MEMBER STATES MUST FOLLOW WHEN INTRODUCING NEW REGULATIONS ON SERVICES

Although, the Treaties do not provide that Member States should notify new rules, ever since Directive 83/189[29] they must consult each other and the Commission before adopting technical regulations, to prevent the emergence of new obstacles to the single market. Over the past forty years, the scope of this procedure has been gradually broadened. Since Directive 98/48[30] – repealed and replaced by Directive 2015/1535 – it covers rules on ISS, thus meeting a need for a supervision mechanism in this crucial area to the economy.[31]

Other directives regulating services in the internal market also provide for notification procedures, notably Directive 2000/31 – which also covers ISS[32] – and Directive 2006/123 – which applies to a much wider range of services. However, considering recent judgments, the procedural obligations applicable to national measures on ISS – under the partly redundant provisions of Directive 2015/1535 and Directive 2000/31 – (2.1) appear much stricter than those regarding national rules on other services (2.2).

2.1 Procedural obligations regarding the regulation of ISS

The question whether national laws regulating composite services must be notified under Directive 2015/1535 and Directive 2000/31 was at the heart of the landmark cases regarding the classification of such services: *Elite Taxi, Uber France, Airbnb Ireland, Star Taxi App* and *A*. It was also at the center of *VG Media*, stemming from an action for damages launched by a German collective management organization defending copyright against Google News.

As EU law currently stands, Member States wishing to regulate ISS are subject to at least two distinct obligations to notify.[33] First, Article 5(1) of Directive 2015/1535 provides that Member States shall immediately communicate to the Commission any draft technical regulation, including rules on services. Also, under this provision, the

29 Council Directive 83/189/EEC of 28 Mar. 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 109, 26 Apr. 1983, at 8–12.

30 Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, OJ L 204, 21 July 1998, at 37–48.

31 Commission, Directive 98/34/EC: An instrument of cooperation between institutions and enterprises to ensure the smooth functioning of the Internal Market. A guide to the procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (2005), at 7.

32 *See also* Directive 2010/13.

33 Member States may also need to notify regulations applicable to video-sharing platform services under Arts 3 and 4 of Directive 2010/13, as amended by Directive 2018/1808.

Commission shall immediately forward such draft to the other Member States. Article 6 of the Directive specifies that the entry into force of the notified measure is postponed for a standard period of three months, which can be prolonged in certain cases. During this period, the Commission will analyse its compatibility with EU law.

Second, under Article 3(4)(b) of Directive 2000/31 – the so-called internal market clause of the Directive – before taking measures in respect of a given ISS provided in their territory, Member States must (1) ask the Member State of establishment to take measures and observe that the latter fails to act, or acts inadequately, and (2) notify the Commission and this Member State of its intention to take such measures.[34]

Even though Directive 2000/31 refers to Directive 2015/1535 regarding the definition of ISS, none of these Directives takes account of the procedure set out by the other.[35] Worse, the rather wide scopes of the notification requirements set out in these two instruments partially intersect. This creates uncertainty and unjustified yet high costs for national administrations wishing to secure the enforceability of national provisions (2.1.1), especially since the Court has clarified that failure to notify a measure under either of these procedures renders it unenforceable (2.1.2.).

2.1.1 *The Scopes of the E-commerce and the Single Market Transparency Directives*

Directive 2015/1535 requires that Member States notify general rules on services 2.1.1[a] while, under Directive 2000/31, rules restricting the freedom of foreign operators to provide services in a Member States should be notified 2.1.1[b]. Regrettably, the Court has not yet provided guidance on how Member States should act when both Directives apply, which may lead to unnecessary notifications overwhelming national and European administrations 2.1.1[c].

2.1.1[a] Rules Notifiable Under the Single Market Transparency Directive

The obligation Directive 2015/1535 sets out applies to technical regulations, including rules on services.[36] Under Article 1(1)(e) of the Directive, a 'rule on services' is a 'requirement of a general nature relating to the taking-up and pursuit of [ISS] activities […], in particular provisions concerning the service provider, the services

[34] Cases C-390/18, *supra* n. 6, para. 95; Case C-649/18, *A*, *supra* n. 5, para. 34.

[35] Unlike Art. 15(7) of Directive 2006/123, which accounts for Directive 2015/1535, *see* below.

[36] Article 1(1)(f) of Directive 2015/1535.

and the recipient of services, excluding any rules which are not specifically aimed at said services'.

Regarding the wording 'specifically aimed', the Directive specifies that 'a rule shall be considered to be specifically aimed at [ISS] where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner'. It finally adds that 'a rule shall not be considered to be specifically aimed at [ISS] if it affects such services only in an implicit or incidental manner'.[37]

The Court has issued two significant judgments relating to provisions of Directive 98/34, as amended by Directive 98/48,[38] that are substantively identical to the provisions mentioned above.

In *Falbert*, a Danish rule did not explicitly refer to ISS and did not draw any distinction between services provided offline and services provided online.[39] The referring court however indicated that this rule was aimed at extending existing provisions in order to cover online services.[40] The Court noted that it was sufficient that some of the provisions of a rule pursued the specific object to regulate ISS for this rule to be considered aiming specifically at ISS, adding that this could even be 'gleaned quite readily from the stated reasons given for the rule'.[41]

Further, it underlined that the object of the Directive was 'to adapt existing national legislation to take account of new [ISS] and avoid restrictions on the freedom to provide services and freedom of establishment leading to "refragmentation of the internal market"'.[42] Observing that it would:

> run counter to that objective to exclude a rule, in respect of which the *travaux préparatoires* stated clearly that its aim and object were to extend an existing rule in order to cover [ISS], from classification as a rule aimed specifically at such services […] on the sole ground that the operative part of that rule makes no express reference to those services but instead covers them through a broader definition of services covering both services provided online and services provided offline,[43]

it concluded that the national rule at issue was a technical regulation.[44]

37 *See also* regarding the identical provisions of Directive 98/34, Opinion of AG Bobek in case C-255/16 *Falbert*, 26 July 2017, EU:C:2017:608, paras 63–95; Opinion of AG Szpunar in Case C-320/16, *Uber France*, 4.07.2017, EU:C:2017:511, paras 23 and 24; and Opinion of AG Hogan in Case C-299/17, *VG Media*, 13 Dec. 2018, EU:C:2018:1004, para. 22.

38 Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 217, 5 Aug. 1998, at 18–26.

39 Case C-255/16, *Falbert*, 20 Dec. 2017, EU:C:2017:983.

40 *Ibid*., para. 13.

41 *Ibid*., para. 32.

42 *Ibid*., para. 34.

43 *Ibid*., para. 35.

44 *Ibid*., para. 36.

In *VG Media*, the Court reached the same conclusion, relying heavily on its judgment in *Falbert*,[45] regarding new German provisions adding to the national copyright law that operators of Internet search engine are not entitled without appropriate authorization to use excerpts of certain text, images and video content provided by press publishers.[46]

It ascertained that, initially, the amendment specifically concerned search engine providers and held that it mainly aimed at protecting the legitimate interests of publishers of newspapers and magazines in the digital world, adding that that 'protection appear[ed] to have been considered necessary only for systematic infringements of works of online publishers by [ISS] providers'.[47]

It then dismissed the fact that the prohibition on making newspapers or magazines available to the public related not only to online service providers, but also to offline ones, and, quoting *Falbert*, it ruled that:

> it would, however, run counter to [the objective of the Directive] to exclude a rule, the aim and object of which is <u>in all probability</u> to regulate online services relating to newspapers or magazines, from classification as a rule specifically targeting such services […] on the sole ground that its wording not only refers to online services, but also to services provided offline.[48]

In *Star Taxi App*, the referring court asked if Directive 2015/1535 required the notification of a decision adopted in 2017 by the City of Bucharest. This decision amended a 2008 decision, which implemented a 2003 national law in the city by subjecting taxi dispatching services to prior authorization, to also impose this requirement on operators of IT applications, such as Star Taxi App. It also created an obligation for all taxis to use dispatching services provided by authorized dispatchers that enabled customers to request their services by telephone or by other means, including online applications.[49]

In light of *Falbert* and *VG Media* – and provided that Directive 2015/1535 applied and that the 2017 local decision at stake in <u>*Star Taxi App*</u> did not merely make the exercise of the activity of dispatching subject to prior authorization[50] – it seemed that the decision needed to be notified under Directive 2015/1535.

Advocate General Szpunar was not convinced that decisions of the City of Bucharest were subject to the notification obligation set out in Directive 2015/

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45 Case C-299/17, *supra* n. 24, paras 32, 33 and 37.

46 Opinion of AG Hogan in Case C-299/17, *supra* n. 37, para. 1.

47 Case C-299/17, *supra* n. 24, para. 36.

48 *Ibid*., para. 37.

49 Case C-62/19, *supra* n. 6, para. 30; *See also* Opinion of AG Szpunar in Case C-62/19, *Star Taxi App*, 10 Sept. 2020, EU:C:2018:1004, para. 24.

50 Such a rule would not constitute a technical regulation according to settled case-law. Case C-255/16, *supra* n. 39, para. 16; Case C-144/16, *Município de Palmela*, 1 Feb. 2017, EU:C:2017:76, para. 26; Case C-336/14, *Ince*, 4 Feb. 2016, EU:C:2016:72, para. 76.

1535,[51] which he nevertheless applied to the 2003 national law. As the latter could not possibly aim at regulating, in an explicit and targeted manner, services that did not exist at the time it was passed, the Advocate General logically found that it did not constitute a technical regulation within the meaning of the Directive.[52] Therefore no notification was required.

The Court came to the same conclusion but, surprisingly, did not rely on any of the arguments mentioned above. It followed instead an unsettling logic calling for the following four remarks.

First, despite the clear wording of the request for a preliminary ruling, which referred to the obligation to notify the 2017 decision, as rightly laid down in the Advocate General's Opinion,[53] the Court considered that the referring court asked if the 2008 decision should have been notified.[54] The Court had to know what it was doing, but its intentions remain unclear.

Second, the Court said that neither the 2003 national law nor the 2008 decision mentioned ISS, while at the same time acknowledging that the decision covered all types of dispatching service indiscriminately, whether provided by telephone or by any other means, 'such as computer applications'.[55] In light of settled case-law on ISS, it is hardly conceivable that the Court intended to say that dispatching services provided by computer applications did not constitute such services.

Third, the Court relied on the fact that the 2003 national law required the possession of radio equipment, which platforms such as Star Taxi App did not need to provide their services, to reach the conclusion that the law did not aim specifically at ISS.[56] This is unfortunate since the Court precisely relied on the fact that this law was irrelevant to platforms to rule that it imposed disproportionate requirements[57]: conditioning the issuance of an authorization on the possession of equipment that is not relevant for electronic service providers generated undue costs and could not comply with Article 10 of Directive 2006/123.[58]

The judgment thus suggests that imposing disproportionate conditions may allow Member States to escape their duty to notify. This is regrettable since it is desirable that such conditions are notified, for the Commission to identify them and oppose their adoption, under the procedure set out in Directive 2015/1535.

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[51] Pursuant to Art. 1(1)(f) of Directive 2015/1535, Art. 5 thereof only covers technical regulations imposed by the authorities designated by the Member States; *See* Opinion of AG Szpunar in Case C-62/19, *supra* n. 49, para. 105.

[52] Opinion of AG Szpunar in Case C-62/19, *supra* n. 49, paras 109–111.

[53] *Ibid.*, para. 104.

[54] Case C-62/19, *supra* n. 6, paras 36 and 56.

[55] *Ibid.*, para. 64.

[56] *Ibid.*, para. 65.

[57] *Ibid.*, para. 90.

[58] *Ibid.*, para. 90.

Fourth and finally, the main question that remains open regarding the scope of the notification obligation set out in Directive 2015/1535 is whether a new rule and the general legal framework it aims at amending to regulate digital services must be considered jointly or separately. In *Star Taxi App*, the Court clearly opted for the first approach, which drastically increases the probability that such amending rules are not considered technical regulations. Not only does this contrast with *Falbert* and *VG Media*, it also appears to undermine twenty-five years of case-law strengthening the enforcement of notification procedures.[59]

2.1.1[b] Rules Notifiable Under the E-commerce Directive

Article 3(4) of Directive 2000/31 imposes that Member States notify measures that 'derogate from paragraph 2', i.e., measures restricting the freedom of companies established in another Member State to provide services. Still, until *Airbnb Ireland*, in which the Court seized the opportunity to clarify the scope of this provision for the first time, it was to be ascertained whether this provision covered (1) general measures and (2) measures that predate the entry into force of the directive.

Regarding the issue whether the Directive covers general measures, in *Airbnb Ireland*, Advocate General Szpunar had convincingly argued that Member States may only adopt measures on a case-by-case basis, and must refrain from adopting 'measures of a general and abstract nature'.[60] After all, the very wording of Directive 2000/31 indicates that it solely covers measures taken in respect of 'a given information society service'.[61] The Court went the other way in *Airbnb Ireland* and in *A*, applying Article 3(4) of Directive 2000/31 to general measures. Therefore, it is now clear that this provision applies to general measures (this is further discussed in section 3.1 below).

Yet, the first ident of Article 3(4)(b) of the Directive – requiring that the notifying Member State observe that the Member State of establishment fails to act upon notification, or acts inadequately, before adopting measures – seems to make little sense when applied to general measures. First, general measures do not target specific operators. This makes the identification of all the operators covered not only

59 Case C-194/94, CIA Security, 30 Apr. 1996, EU:C:1996:172.; Case C-443/98, Unilever, 26 Sept. 2000, EU:C:2000:496.; Case C-390/18, n. 6.

60 Opinion of AG Szpunar in Case C-390/18, *Airbnb Ireland*, 19 Dec. 2019, EU:C:2019:336, paras 129–135. The Commission shared this interpretation: *see* Commission, Communication from the Commission of 14 May 2003, Central Bank application to financial services of Art. 3(4) to (6) of the electronic commerce directive, COM(2003) 259 final, paras 2.1.1 and 2.1.2; *see also* First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), COM(2003) 0702 final.

61 This is specified twice in this provision.

burdensome[62] but also inefficient, since the list of operators covered may evolve over time. Second, assuming that Member States bypass this obligation by notifying all other Member States – which can be recommended in order to avoid legal risk – the Directive requires that they do not regulate operators whose Member State of establishment adopts sufficient measures. Therefore, if certain Member States cooperate, but others do not, the notifying Member State has no choice but to reshuffle the scope of the intended rule to exclude the operators established in diligent Member States, which may not even be an option under national law.

In light of the above, there is no wonder why the Court ignored the first ident of Article 3(4)(b) of Directive 2000/31 when summarizing the procedural conditions set out in this provision in *Airbnb Ireland*,[63] and, later, in *A*.[64]

Regarding the issue whether Directive 2000/31 covers measures that predate its entry into force, the Court answered in the positive.[65] Here also the Court's interpretation contrasts with the very wording of the Directive, which requires Member States to notify measures 'before taking [them]'. Therefore, Member States now need to notify measures predating the entry into force of the Directive with the hope of satisfying the national judge to which the question of the applicability of these measures will be referred.

To conclude, with *Airbnb Ireland*, the Court has drastically changed the meaning of Directive 2000/31. Not only is the method highly questionable – only the legislator is entrusted with amending directive provisions – but the consequences for the consistency of the applicable legal framework regarding notifications of regulations on ISS cannot be overlooked, as discussed below.

2.1.1[c] Reconciling the Provisions of the Single Market Transparency and E-commerce Directives

After *Airbnb Ireland*, it is still unclear (1) how the procedure set out in Directive 2000/31 fits with that of Directive 2015/1535, and (2) whether notification under one of these Directives could be considered fulfilling the procedural conditions of the other one.

In *A*, Advocate General Øe took the view that a notification under Directive 2015/1535 could not be a substitute to the one prescribed by Directive 2000/31. In

62 Absent any obligation, under 2000/31, such as that set out in 28a(6) of Directive 2010/13, as amended by Directive 2018/1808, under which 'Member States shall establish and maintain an up-to-date list of the video-sharing platform providers established or deemed to be established on their territory and indicate on which of the criteria set out in paragraphs 1 to 4 their jurisdiction is based. Member States shall communicate that list, including any updates thereto, to the Commission'.

63 Case C-390/18, *supra* n. 6, para. 85.

64 Case C-649/18, *supra* n. 5, para. 42.

65 Case C-390/18, *supra* n. 6, para. 87.

his view, 'the notification obligations laid down in those two provisions apply in a distinct temporal sequence, have a different purpose and are complementary in nature'[66]: Member States should first notify their general draft regulation to the Commission under the Directive 2015/1535 so as to ensure its conformity with freedom of movement, and, second, fulfil the procedural conditions of Article 3(4)(b) in order to apply those rules, in a specific case, to a particular provider or service.[67] Although this interpretation was rather convincing, it seems contradicted by the fact that the Court applies Article 3(4) of Directive 2000/31 to general measures.

The Court has not yet taken any clear stance on the issue. In *A*, it ruled on the consequence of a failure to notify under Directive 2000/31 without mentioning that some of the provisions at issue had been notified under Directive 2015/1535,[68] which may indicate that notification obligations are not substitutable. Still, in the absence of a Court's explicit ruling – and considering that the two Directives lay down a set of distinct procedural conditions, with a different scope – a safe view is that each notification procedure should be applied separately. Consequently, Member States should notify all the measures that fall within the scope of the obligation set out in Directive 2000/31, whether notified under Directive 2015/1535 or not: new measures, but also of measures that predate the entry into force of Directive 2000/31.

Here again, the Court's silence is to be regretted. There is absolutely no point in requiring that certain measures be notified under two legal acts when both purport to have the very same goal. Moreover, notifications entail significant costs for the notifying national administration and for the Commission services entrusted with their review. Still, the safe approach proposed above appears to be the only way for Member States to ensure that their regulations are applicable, considering the most recent judgments on the unenforceability of non-notified measures.

2.1.2 *The sanction for failure to notify under the E-commerce and the Single Market Transparency Directives*

According to EU law orthodoxy, the provisions of a directive that are sufficiently clear and precise cannot have horizontal direct effect, consequential in relationships between private parties. They can only have vertical direct effect, and thus relied on

[66] Opinion of AG Øe in Case C-649/18, *A*, 27 Feb. 2020, EU:C:2020:134, para. 117.
[67] *Ibid*., paras 118–119.
[68] Case C-649/18, *supra* n. 5, paras 41–43. Regarding the national measures at issue, *see* notifications 2016/410/F and 2016/411/F.

by a private party against a Member State,[69] if the directive has not been correctly transposed by the deadline.[70]

The rationale behind this is that 'a Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails'.[71] This explains why the direct effect of directives should *a priori* not be extended to individual relationships: they are not the addressees of a directive and should not be penalized for the Member State's failure to comply with it.

However, the directives' lack of horizontal direct effect has been progressively watered down. The Court has successively expanded the notion of 'State'[72] and required Member States to interpret national law in accordance with directives that are not yet transposed.[73] Further, it has created a so-called 'incidental horizontal direct effect',[74] ruling that failure to notify national measures under Directive 2015/1535 or Directive 2000/31 resulted in these measures being unenforceable against individuals,[75] not only in criminal proceedings[76] but also in a dispute between individuals.[77] This crucial issue is to be discussed in further detail.

2.1.2[a] The Sanction for Failure to Comply With the Provisions of the Single Market Transparency Directive

In *CIA Security*, the Court held that a failure to notify a technical regulation under Directive 2015/1535 rendered such regulation inapplicable and unenforceable against individuals.[78] Relying on the fact that 'the aim of the directive is to protect freedom of movement for goods by means of preventive control and that the obligation to notify is essential for achieving such Community control', it said that '[t]he effectiveness of Community control will be that much greater if the directive is interpreted as meaning that breach of the obligation to notify constitutes a substantial

[69] *See* among others, Case 152/84, *Marshall*, EU:C:1986:84, para. 48; Case C-91/92, *Faccini Dori*, EU:C:1994:292, paras 20–24; Case C-194/92, *El Corte Ingles,* EU:C:1996:88, para. 15; Joined Cases C-397 to C-403/01, *Pfeiffer and Others*, EU:C:2004:584, para. 108; Case C-282/10, *Dominguez*, EU:C:2012:33, para. 37; Case C-176/12, *Association de médiation sociale*, EU:C:2014:2, para. 36; Case C-122/17, *Smith*, EU:C:2018:631, paras 42–43.

[70] 41/74, *Van Duyn v. Home Office*, 4 Dec. 1974, EU:C:1974:133.

[71] Case 148/78, *Ratti*, 5 Apr. 1979, EU:C:1979:110, para. 22.

[72] Case C-188/89, *Foster*, 12 Jul.1990, EU:C:1990:313.

[73] Case C-106/89, *Marleasing*, 13 Nov. 1990, EU:C:1990:395.

[74] Van Cleynenbreugel, *supra* n. 22.

[75] Case C-194/94, *supra* n. 59, para. 54.

[76] Case C-336/14, *Ince*, 4 Feb. 2016, EU:C:2016:72, para. 84.

[77] Case C-613/14, *James Elliott Construction*, 27 Oct. 2016, EU:C:2016:821, para. 64 and the case-law cited.

[78] Case C-194/94, *supra* n. 59, para. 54.

procedural defect such as to render the technical regulations in question inapplicable to individuals'.[79] In *Unilever*, the Court later said that the same sanction applied if, although notified, the technical regulation was adopted before the end of the standstill period provided for in the Directive.[80]

Given that in *CIA Security* and *Unilever*, the main proceedings were horizontal in nature, the Court's judgments undoubtedly affected the legal interests of private parties, which seemed at loggerheads with settled case law on the lack of horizontal direct effect for directives. In this regard, the Court clarified, in *Unilever*, that this line of case law did not apply 'where non-compliance with Article 8 or Article 9 of Directive 83/189 [now Article 5 or 6 of Directive 2015/1535], which constitutes a substantial procedural defect, renders a technical regulation adopted in breach of either of those articles inapplicable'[81] because the Directive does not 'in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it [and created] neither rights nor obligations for individuals'.[82]

These judgments led the number of notifications under Directive 2015/1535 to soar,[83] paving the way for a better enforcement of EU law. This may have prompted the Court to create a similar sanction for failure to comply with the procedure set out in Directive 2000/31.

2.1.2[b] The Sanction for Failure to Comply With the Provisions of the E-commerce Directive

In *Airbnb Ireland*, the Court clarified that the sanction for failure to comply with the notification procedure set out in Directive 2000/31 also resulted in the unenforceability of national provisions,[84] dismissing the argument of the Spanish government that a distinction could be made between the two directives on the ground that, unlike Directive 2015/1535, Directive 2000/31 does not foresee any standstill obligation.[85] The Court considered that Article 3(6) of Directive 2000/31 sets out a similar procedure to that of Directive 2015/1535, which is 'not simply a requirement to provide information […], but rather an essential procedural requirement

79 *Ibid.*, para. 48.
80 Case C-443/98, *supra* n. 59, para. 49.
81 *Ibid.*, para. 50.
82 *Ibid.*, para. 51.
83 Commission, 'Report from the Commission to the Council, the European Parliament and the Economic and Social Committee - The operation of Directive 98/34/EC from 1995 to 1998' COM (2000) 429, at 21–22.
84 Case C-390/18, *supra* n. 6, paras 96–97.
85 *Ibid.*, para. 93.

which justifies the unenforceability of non-notified measures restricting the freedom to provide an information society service against individuals'.[86]

Noticeably, and as Pieter Van Cleynenbreugel rightly pointed out, the Court had 'to abandon a key background assumption' of *CIA Security* and *Unilever* to reach that conclusion.[87] It did not say that the notification procedure did not define the substantive scope of the legal rule on the basis of which the national court must decide the case, or that it did not create rights nor obligations for individuals (*see* above).[88] In fact, as measures that must be notified under Article 3(4)(b) of the Directive must also comply with the substantive conditions set out in Article 3(4)(a) thereof, it would have been impossible for the Court to make that background assumption in this case.

Although Advocate General Szpunar's latest Opinion in *Thelen Technopark Berlin*[89] indicates that he may not agree with this statement, *Airbnb Ireland* may have incidentally expanded the list of (not so) exceptional situations in which directives have horizontal direct effect.

In any case, national jurisdictions have already started applying this judgment in national procedures regarding general measures. For instance, the Court of Appeals of Lyon recently ruled that a French law prohibiting the sale of tickets to a sporting or cultural performance without the authorization of its producer were inapplicable to Facebook's marketplace, since they were never notified to the Commission or to Member States under Directive 2000/31.[90]

2.2 Procedural obligations regarding other services

Member State regulations targeting ISS are not the only rules that must be notified under the applicable legal framework in the field of services. Article 15(7) and 39(5) of Directive 2006/123 provide for the notification of measures that restrict the freedom of establishment and the freedom to provide services.

Under Article 15(7) of Directive 2006/123, Member States shall notify the Commission of any new rules which set 'requirements to be evaluated' under paragraph 2 of this provision. It also shall examine the compatibility of the notified requirements with EU law within a period of three months. Finally, unlike the

86 *Ibid.*, para. 94.
87 Van Cleynenbreugel, *supra* n. 22, at 1226.
88 Case C-443/98, *supra* n. 59, para. 51; *see also* Bert Keirsbilck, *Case C-62/19: Star Taxi App Srl – Online Platforms Under EU Law*, 2 REDC 266 (2021).
89 Opinion of AG Szpunar in Case C-261/20, *Thelen Technopark Berlin*, 15 July 2021, EU:C:2021:620, para. 49.
90 Judgment of the Court of Appeals of Lyon, 29 July 2020, *Facebook Ireland*, 20/03296. Noticeably, the Court did not ascertain that the provisions at issue constituted restrictions to the freedom to provide services.

provisions of Directive 2000/31, Article 15(7) provides that the notification of a draft rule in accordance with Directive 2015/1535 fulfils the obligation of notification provided for in this Directive. It does not say that it works the other way around.

Pursuant to Article 39(5) of Directive 2006/123, new national requirements restricting the freedom to provide services whose application could fall under Article 16 of the Directive – regulating restrictions to freedom to provide services – must be transmitted to the Commission, which shall communicate them to other Member States.

As under Directive 2015/1535, the Commission shall communicate the notified provisions to other Member States under Article 15(7) and Article 39(5). Unlike under Directive 2015/1535, notification under Directive 2006/123 does not prevent Member States from adopting the notified provisions.

The Court has never examined whether failure to notify under Directive 2006/123 is sanctioned by the inapplicability of the national rules at stake. The question is whether Articles 15(7) and 39(5) constitute mere information requirements or essential procedural requirements.[91]

In the context of the 2015 Single Market Strategy,[92] the Commission observed that only a few measures had been notified since the entry into force of the Directive, that Member States often notified the rules adopted and not their drafts, and that businesses and individuals could not access notifications, unlike under Directive 2015/1535.[93] Consequently, it issued a proposal for a directive on the enforcement of Directive 2006/123[94] which aimed at strengthening the procedure by, inter alia, introducing a three-month standstill period and providing that:

> failure to comply with the obligation to notify draft measures at least three months prior to their adoption and/or to refrain from adopting the notified measure during this period and, as the case may be, during the 3 months following the reception of an alert, should be considered to be a substantial procedural defect of a serious nature as regards its effects visà-vis individuals.[95]

The proposal would have settled the question of the sanction attached to failure to notify under the Directive, but was since withdrawn. Therefore, it remains to be seen

91 Case C-390/18, *supra* n. 6, para. 94; Case C-194/94, *supra* n. 59, para. 50; Case C-443/98, *supra* n. 59, para. 42.

92 Communication from the Commission of 28 Oct. 2015, Upgrading the Single Market: More opportunities for people and business, COM (2015) 550 final.

93 *Ibid.*, at 20.

94 Proposal for a Directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorization schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, 10 Jan. 2017, COM(2016) 821 final.

95 Recit.15; *see also* Art. 3(4).

whether the Court will extend, once more, its case-law on the unenforceability of non-notified national measures.

It may be argued that non-notified measures under Directive 2006/123 should be unenforceable.[96] This could help to achieve consistency of the legal framework on services and to promote better law enforcement. However, consistency can only be achieved if there is no overlap between the respective scopes of the existing information procedures. Further, notification obligations can only lead to better enforcement if they are met and if the ensuing notifications are reviewed. The total number of notifications should thus be within reason.

A legal act amending all the directives above is more than needed. To prevent the number of notifications from skyrocketing, it should only concern services deemed of strategic importance for the EU single market, a definition of which the Commission could be entrusted with making according to the state of the economy.

3 FREEDOM TO PROVIDE SERVICES AND FREEDOM OF ESTABLISHMENT

Besides the procedural requirements examined above, Member State rules on services must comply with several substantive requirements, whose nature depends on the types of services targeted. Under Articles 52 and 62 TFEU, restrictions to the freedom of establishment and to the freedom to provide services, respectively guaranteed by Articles 49 and 56 TFEU, must be justified on grounds of public policy, public security or public health. It is settled case-law that numerous 'overriding reasons relating to the public interest' may also justify such restrictions.[97] This field of EU law has been further harmonized by secondary legislation. Directive 2006/123 covers all requirements relative to services, with the exception of a 'long and broad' list of activities and matters.[98] Further, Directive 2000/31 – which is a *lex specialis* in relation to Directive 2006/123[99] – and Directive 2010/13 – which is a *lex specialis* in relation to Directive 2000/31[100] – are specifically[101] aimed at ISS.

While distinct but substantially similar provisions provide for the freedom to provide, respectively, ISS and other services (3.1), the prohibition of obligations of general monitoring set out in Directive 2000/31 finds no equivalent under other acts and allows to distinguish between ISS and other services (3.2). On the contrary, there

[96] Keirsbilck, *supra* n. 88, at 266.
[97] *See* for instance, recit. 40 of Directive 2006/123.
[98] Catherine Barnard, *The Substantive Law of the EU* 418 (Oxford: Oxford University Press 2016).
[99] Article 3(1) of Directive 2006/123.
[100] Article 4(7) of Directive 2010/13, as amended by Directive 2018/1808.
[101] But not exclusively in the case of Directive 2010/13.

is no clear distinction between the provisions applicable to ISS and those applicable to other services as regard freedom to establishment (3.3). In any case, experience shows that applying this legal framework to composite services may have contradictory consequences (3.4).

3.1 Freedom to provide services

Regarding Directive 2006/123, Article 16(1) thereof provides that 'Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements' which are discriminatory or cannot be justified by reasons of public policy, public security, public health or the protection of the environment.[102] Pursuant to Article 18 of the Directive, '[b]y way of derogation from Article 16, and in exceptional circumstances only, a Member State may, in respect of a provider established in another Member State, take measures relating to the safety of services', provided that the mutual assistance procedure laid down in Article 35 is complied with.

Regarding Directive 2000/31, Article 3(2) thereof provides that Member States may not restrict the freedom to provide ISS from another Member State. Nevertheless, under Article 3(4), Member States may, in respect of a given ISS falling within the coordinated field, take measures that derogate from the principle of the freedom to provide ISS.[103]

In *Airbnb Ireland*, the Court summarized the provisions of Article 3(4)(a) of Directive 2000/31 as follows:

> Member States may, in respect of a given information society service, take measures that derogate from Article 3(2) of that directive, provided, first, that those measures are necessary in the interests of public policy, the protection of public health, public security or the protection of consumers; secondly, that those measures are taken against an [ISS] which actually undermines those objectives or constitutes a serious and grave risk to those objectives; and, thirdly, that those measures are proportionate to those objectives.[104]

Applying this provision for the first time in *A*, it specified that, regarding the conditions of necessity and proportionality:

> account must be taken […] of the case-law relating to Articles 34 and 56 TFEU, for the purposes of assessing whether the national legislation at issue complies with EU law, in so far as those conditions largely overlap with the requirements that must be fulfilled by any obstacle to the fundamental freedoms guaranteed in those articles of the TFEU.[105]

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[102] For an overview of the debate between the Court's AG regarding the nature of the list in Art. 16, para. 2, *see* Opinion of AG Wahl in case C-33/17, Čepelnik, 8 May 2018, EU:C:2018:311, para. 71.

[103] C-390/18, *supra* n. 6, paras 83–84. These provisions applies to video-sharing platform services, under Art. 28a(5) of Directive 2010/13, as amended by Directive 2018/1808.

[104] Case C-390/18, *supra* n. 6, para. 63.

[105] *Ibid.*, para. 64.

In *Airbnb Ireland*, the Court also clarified that Article 3(4) of Directive 2000/31 applies to general measures (*see* 2.1.1 above). This creates legal intricacies, but it gives Member States where ISS are provided more leeway, which is to be commended, at a time when many platforms establish themselves in Member States that are reluctant to regulate them.[106]

Finally, the Court has made clear, in *Rina Services*[107] and *A*,[108] that an interpretation of the provisions of Directive 2006/123 and 2000/31, to the effect that Member States may justify, on the basis of primary law, a requirement that does not meet the conditions laid down in these provisions, would deprive them of any practical effect by ultimately undermining the harmonization intended.

After the aforementioned judgments, it would seem that the provisions of Article 3(4)(a) of Directive 2000/31 and Article 16(1) of Directive 2006/123 are quite similar. They both provide for closed lists of public interest grounds that Member States may rely on to justify a restriction to the freedom to provide services, including reasons relating to public health, public order and public security. Thus, the main difference between these provisions is that, under Directive 2000/31, national measures may be justified by, inter alia, the need to protect consumers whereas, under Directive 2006/123, they may be justified by, inter alia, the need to protect the environment.[109]

This has no consequence in certain cases. For instance, even if the service provided by Airbnb had been classified as an overall service whose main element is an accommodation service – and not as an ISS – Member States would not have been able to require that the platform excludes hosts that are not registered with local authorities, a measure that could be justified by the need to combat the rental housing shortage but not under any of the grounds contained in the Directives.[110]

Regarding services that escape both the scopes of Directives 2000/31 and 2006/123, such as telehealth services,[111] Member States may rely on any of the numerous

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106 A concern the proposal for a DSA aims at addressing: 'In case of persistent infringements, the Commission – on recommendation by the Board, at the invitation of the competent Digital Services Coordinator or on its own initiative – may initiate proceedings against very large online platforms'; *see* Commission, *Digital Services Act – Questions and Answers* (15 Dec. 2020).

107 Case C-593/13, *Rina Services and Others*, 16 June 2015, EU:C:2015:399, para. 37.

108 Case C-649/18, *supra* n. 5, para. 34.

109 As regards the distinction between the country-of-origin principle (CoOP), arguably set out in Directive 2000/31, and the freedom to provide services, *see* Barnard, *supra* n. 98, at 421.

110 *See* in this regard, the criticism levelled at the legal framework applicable to Airbnb in Chapuis-Doppler & Delhomme, *Regulating Composite Platform Economy Services*, *supra* n. 7.

111 Articles 2(2)(f) and Recit. 22 of Directive 2006/123, as well as Art. 4(11) of Directive 2006/123, in light of Art. 3(1)(a) of Directive 2005/36/EC of the European Parliament and of the Council of 7 Sept. 2005 on the recognition of professional qualifications OJ L 255, 30 Sept. 2005, at 22–142.

overriding reasons relating to the public interest accepted under the Treaty to restrict their provision.[112]

Regarding services that escape the scopes of both Directives and that of the general Treaty provisions on services, Member States have even more powers. In this regard, in *Elite Taxi*[113] and *Uber France*,[114] the Court ruled that UberPop was an overall service whose main element was a service in the field of transportation – which escapes the scopes of both Directive 2006/123 and Article 56 TFEU – and held that 'as EU law currently stands, it is for the Member States to regulate the conditions under which' services such as UberPop are to be provided 'in conformity with the general rules of the FEU Treaty'.[115]

3.2 The liability safe harbour of the e-commerce directive

A unique element of Directive 2000/31, that has underpinned the development of the Internet in the EU, is the principle that ISS providers should not be held liable for the content that they transmit, store or host, as long as they act in a strictly passive manner.[116] No equivalent principle applies to other kinds of services.

Directive 2000/31 harmonizes the conditions under which certain ISS providers – those providing conduit, cashing and hosting of information at the request of third parties – benefit from the exemption of liability for the illegal content they host (the so-called 'Safe Harbour').[117] More precisely, Article 14(1) of Directive 2000/31 exempts the host ISS provider from liability where it satisfies one of the two conditions listed in that provision, that is to say, not having knowledge of the 'illegal activity or information' or acting 'expeditiously to remove or to disable access to that information' as soon as it becomes aware of it.[118]

In this regard, the Court has already specified that only ISS providers that play a neutral role may benefit from this provision.[119] It has also clarified that knowledge of the 'illegal activity or information' does not cover a situation in which an operator is

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112 For an overview of the reasons accepted until 2006, *see* recit. 40 of Directive 2006/123.

113 Case C-434/15, *supra* n. 4.

114 Case C-320/16, *supra* n. 4.

115 Case C-434/15, *supra* n. 4, para. 47.

116 Communication from the Commission of 6 May 2015, A Digital Single Market Strategy for Europe, COM(2015) 192 final, at 12; *see also* Jan Bernd Nordemann, *Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed?*, Study for the European Parliament PE 614.207 (2018).

117 *See* Art. 15 of Directive 2000/31; *See also* Thomas Riis & Sebastian Felix Schwemer, *Leaving the European Safe Harbor, Sailing Towards Algorithmic Content Regulation*, 22(7) J. Internet L. 3 (2019); Maria Lillà Montagnani & Alina Trapova, *New Obligations for Internet Intermediaries in the Digital Single Market – Safe Harbors in Turmoil?*, 22(7) J. Internet L. 3 (2019).

118 Case C-18/18, *supra* n. 20, para. 23.

119 Joined cases C-236/08 to C-238/08, *Google France and Google*, 23 Mar. 2010, EU:C:2008:389, para. 114; Case C-324/09, *L'Oréal*, EU:C:2011:474, para. 116; Joined cases C-682/18 et C-683/18, *supra* n. 21, para. 105.

'aware, in a general sense, of the fact that its platform is also used to share content which may infringe intellectual property rights and […] therefore has an abstract knowledge that protected content is being made available illegally on its platform'.[120] On the contrary, the situations mentioned in Article 14(1)(a) 'refer to specific illegal information and activities'.[121]

Pursuant to Article 15(1) of this Directive, Member States must not impose a general obligation on providers, when supplying the services covered by Article 14, to monitor the information that they transmit or store, or a general obligation to actively seek facts or circumstances indicating illegal activity.[122] The scope of this prohibition, however, is one of the critical issues the Court has recently addressed.[123]

Regarding the scope of national obligations and injunctions, the Court ruled in *L'Oréal*,[124] *Scarlett Extended*,[125] *SABAM*,[126] and *McFadden*[127] that Article 15 of Directive 2000/31 opposed:

- an obligation requiring an online service provider to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual property rights via its website;
- an injunction ordering an Internet Service provider or a hosting service provider to install filtering technology so as to prevent any future infringement of intellectual-property rights; and
- an injunction to a communication network access provider to monitor all of the information transmitted.

Arguably, these judgments suggest that Article 15 of Directive 2000/31 opposes filtering obligations, including those for the purposes of locating infringements of specific pre-identified rights. Nevertheless, in *Glawischnig-Piesczek*, the Court found that court-mandated filtering for the purpose of locating and removing content that is identical or equivalent to content that has been determined to be unlawful may be compatible with this provision.[128] Specifically, it held that the prohibition contained in Article 15 of Directive 2000/31 does not concern obligations imposed 'in a specific case'.[129]

Even though it may seem contradictory to qualify an obligation to monitor all the content stored as 'specific', it would seem that the scope of the material inquiry

120 Joined cases C-682/18 et C-683/18, *supra* n. 21, para. 111.
121 *Ibid.*, para. 112.
122 Article 28b(3) of Directive 2010/13, as amended by Directive 2018/1808.
123 Andrea Bertolini et al., *Liability of Online Platforms*, European Parliamentary Research Service, 32 (2021).
124 Case C-324/09, *supra* n. 119, para. 139.
125 Case C-70/10, *Scarlet Extended*, 24 Nov. 2011, EU:C:2011:771, para. 40.
126 Case C-360/10, *SABAM*, 16 Feb. 2012, EU:C:2012:85, para. 38.
127 Case C-484/14, *Mc Fadden*, 15 Sept. 2016, EU:C:2016:689, para. 87.
128 Case C-18/18, *supra* n. 20.
129 *Ibid.*, para. 34.

defines whether a monitoring obligation is general or specific under EU law. In this regard, monitoring all content in search of particular instances of illegal content appears to be specific enough to escape the prohibition set out in Article 15 of Directive 2000/31.[130]

In *YouTube*, Advocate General Øe confirmed that this provision does not preclude any obligation to detect and block specific files: if 'a provider may not be compelled, by way of injunction, to undertake general filtering of the information it stores *in order to seek any infringement*', 'the provider [may be] compelled to block a *specific file* that uses a protected work that has been held to be illegal by a court'.[131]

Regarding the procedure that must be followed for obtaining an injunction under national law, in *YouTube*, the Court arguably clarified that prior notification must be required from the plaintiff.

Specifically, it held that, absent such a procedural condition under national law, operators of an online content-sharing platform would be required to actively monitor all the content uploaded by users of that platform in order to prevent infringements of an intellectual property right by users of that platform and to avoid being the subject of an injunction and being exposed to costs on account of those infringements.[132]

This line of case-law is still developing and it remains to be seen how the Court will reconcile the need to protect platform operators from excessive obligations with the need to protect the rights enshrined in the Charter of Fundamental Rights, specifically with regard to modern technologies, such as algorithmic filtering of content uploaded on social media platform.[133] In any case, this issue is specific to ISS providers.

3.3 Freedom of establishment

In two recent cases, the Court was called to rule on whether Member States could subject the provision of composite services by operators established in the territory of another Member State to authorization requirements.[134] *Cali Apartments* concerned the authorization scheme applicable to Airbnb hosts in Paris[135] and *Star Taxi App* the authorization scheme imposed on ride-hailing mobile applications by the City of

130 Luc von Danwitz, *The Contribution of EU Law to the Regulation of Online Speech*, Michigan Technology Law Review 180 (2021).

131 Opinion of AG Øe in Joined cases C-682/18 et C-683/18, *supra* n. 21, para. 221.

132 *Ibid.*, para. 136.

133 *See* in the field of data protection, case C-507/17, *Google (Territorial scope of de-referencing),* 24 Sept. 2019, EU:C:2019:772.

134 The question whether authorization requirements may be imposed by the Member State of destination relates to the freedom to provide services. *See* 3.2 below.

135 Joined cases C-724/18 and C-727/18, *supra* n. 26, para. 21.

Bucharest.[136] Member States may impose authorization requirements under several EU legal acts in the field of, inter alia, payment, finance and electronic communications.[137] When no such act is applicable, authorization requirements must be examined under Directive 2000/31, Directive 2006/1223 or, if these directives are not applicable, under the Treaty.

In this regard, in *Star Taxi App*, Advocate General Szpunar recalled that, 'although, under EU law, all authorisation schemes are prohibited for [ISS] pursuant to Article 4(1) of Directive 2000/31, such schemes are authorised, subject to certain conditions, for other categories of services in accordance with Articles 9 and 10 of Directive 2006/123 or Article 49 TFEU'.[138] In fact, Article 4 of Directive 2000/31 only prohibits authorization requirements that are 'specifically and exclusively targeted at [ISS]' (3.1.1) while Articles 9 and 10 of Directive 2006/123 only forbid discriminatory and disproportionate schemes, as well as schemes whose conditions are discriminatory, disproportionate, unclear and ambiguous, not objective, not made public in advance, or opaque and inaccessible (3.1.2). Services that escape both the scopes of Directive 2000/31 and Directive 2006/123 may fall under Article 49 TFEU (3.1.3).[139]

3.3.1 *Authorization requirements under the E-commerce Directive*

Article 4(1) of Directive 2000/31 prohibits Member States from subjecting the provision of ISS to prior authorization or any other requirement having equivalent effect. Article 4(2) however specifies that Article 4(1) does not apply to requirements that are not 'specifically and exclusively targeted at information society services'. The

136 Case C-62/19, *supra* n. 6, paras 30–31.

137 *See* for instance, Art. 28 of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 Nov. 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC OJ L 337, 23 Dec. 2015, at 35–127; Arts 16–20 of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ L 302, 17 Nov. 2009, at 32–96; Arts 147–148 of Directive 2009/138/EC of the European Parliament and of the Council of 25 Nov. 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) OJ L 335, 17 Dec. 2009, at 1–155; Art. 8 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27 June 2013, at 338–436; Art. 5 of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173, 12 June 2014, at 349–496; and Art. 13 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 Dec. 2018 establishing the European Electronic Communications Code (Recast), OJ L 321, 17 Dec. 2018, at 36–214.

138 Opinion of AG Szpunar in case C-69/18, *Star Taxi App*, 10 Sept. 2020, EU:C:2020:692, n. 24.

139 Article 49 TFEU applies even to services in the field of transport; *see* Case C-318/14, *Slovenská autobusová doprava Trnava*, 21 May 2015, EU:C:2015:352.

Court interpreted these provisions for the first time in *Star Taxi App*, where it clarified that these were applicable even to purely domestic situations.[140]

Regarding the notion of 'specifically and exclusively targeted', it was not perfectly clear whether Member States could adopt regulations that, while specifically and exclusively targeted at ISS, merely extended the scope of existing rules to include digital services so that the amended rules may not, in fact, target ISS in a specific and exclusive manner under the Directive. In *Star Taxi App*, the Court acknowledged that the 2017 decision – extending the scope of the authorization scheme set out in the 2008 decision – was targeted principally, if not exclusively, at an ISS. Still, noting that this decision merely extended the scope of this scheme – which originally only covered taxi services that are not ISS – to ride-hailing applications, it sided with its Advocate General and ruled that such extension did not amount to the creation of a new authorization requirement targeted specifically and exclusively at ISS.[141]

The Advocate General thought that this interpretation was warranted by the underlying rationale to Article 4(2), which is to prevent unequal treatment between ISS and other services without enabling 'economic operators to evade all legal obligations solely because they operate online'. Specifically, he observed that the offline services covered by the general authorization scheme, which incidentally cover ISS, are likely to be substitutable for these ISS. In these circumstances, he noted that exempting only ISS from such scheme would breach the principles of fair competition and equal treatment.[142]

It results from the above that, when confronted with a national rule which solely aims at amending an existing rule that does not address ISS so as to regulate such services, the Court did not analyse, under Article 4 of Directive 2000/31, the amending rule in isolation, but considered the original rule as amended by the new rule. Therefore, the Court adopted an identical approach under Article 5 of Directive 2015/1535 and under Article 4 of Directive 2000/31 (*see* 2.1.1 above). This approach is quite favourable to Member States, which may confidently adapt existing legislation laying down authorization schemes to the digital era by means of legal acts aimed specifically and exclusively at ISS without being required to notify such acts.

In this regard, if it is certainly commendable, in today's fast moving digital economy, to empower Member States to promptly adapt their legal frameworks, it is

[140] Case C-62/19, *supra* n. 6, para. 75.

[141] *Ibid.*, paras 81–83.

[142] Opinion of AG Szpunar in case C-69/18, *Star Taxi App*, 10 Sept. 2020, EU:C:2020:692, paras 68–70; The AG added a condition: 'that the services covered by the existing authorization scheme […] and the Information Society services to which that scheme is extended are actually equivalent in economic terms. That equivalence must be assessed from the perspective of the user of the service, in other words, the services must be interchangeable from his or her perspective'.

to be pondered why the Court did not uphold the notification requirement under Directive 2015/1535 and preserve the integrity of the procedure set out in the Directive that it has been strengthening through its case-law (*see* 2.1.2 above).

3.3.2 *Authorization requirements under the Services Directive*

Articles 9 – entitled 'Authorisation schemes' – and 10 – entitled 'Conditions for the granting of authorisation' – of Directive 2006/123 subject national authorization schemes applicable to services to a number of conditions. They must, inter alia, be non-discriminatory in nature and justified by an overriding reason relating to the public interest.

In *Star Taxi App*, the Court clarified that the respective provisions of Directives 2000/31 and 2006/123 are not mutually exclusive: Authorization schemes applicable to ISS that are not caught by Article 4 of Directive 2000/31, because they are not specifically and exclusively targeted at ISS, may fall within the scope of Articles 9 and 10 of Directive 2006/123,[143] just like authorization requirements applicable to offline services that are covered by this Directive.

Further, it is settled case-law that Articles 9 and 10 of Directive 2006/123 are even applicable in purely domestic situations.[144] However, their wording is redundant and until *Cali Apartments* and *Star Taxi App*, the Court had never clarified how both provisions shall apply in a specific case. Guidance was specifically needed regarding situations where a national law creates an authorization scheme and sets out criteria which are to be applied by local authorities. In these two cases, the Court ruled that assessing the legislation of a Member State under Articles 9 and 10 'presupposes that separate and consecutive assessments must be made of, first, whether the very principle of establishing that scheme is justified, and, then, the criteria for granting the authorisations provided for by that scheme'.[145]

Cali Apartments concerned the compatibility of a French law subjecting Airbnb hosts to an authorization requirement and allowing local authorities to subject the issuance of such authorization to an offset requirement in the form of the conversion of non-residential premises into housing, the quantum of which is to be defined by their municipal council. In its judgement, the Court ruled that in situations such as this one, where a national law creates an authorization scheme and sets out criteria which are to be applied by local authorities, one must first examine 'whether the use

143 Case C-62/19, *supra* n. 6, para. 81.

144 Joined cases C-360/15 and C-31/16, *X and Visser*, 30 Jan. 2018, EU:C:2018:44, para. 110; Case C-393/17, Kirschstein, 4 Jul. 2019, EU:C:2019:563 *supra*, para. 24; Joined cases C-724/18 and C-727/18, *supra* n. 26, para. 56.

145 Joined cases C-724/18 et C-727/18, *supra* n. 26, para. 58; Case C-62/19, *supra* n. 6, para. 87.

by the national legislature of such a mechanism is in line with Article 9',[146] and then analyse 'whether the criteria set out by that [national] legislature regulating the grant of those authorizations by the local authorities and the effective implementation of those criteria by the local authorities whose measures are contested' is compliant with Article 10.[147]

Moving on, the Court analysed the compatibility of the national law at issue with Article 9 of Directive 2006/123. In this regard, it held that Member States may rely on the protection of the urban environment as well as on social and public housing policy objectives, to justify a requirement under Article 9 of Directive 2006/123.[148] It also noted that the authorization requirement at issue was limited to specific services and to a given geographical scope.[149] It finally considered that *a posteriori* intervention would not allow to put an 'immediate and effective end to the rapid conversion trend' which is creating a housing shortage the French legislature aimed at addressing.[150] In light of the above, it ruled that the French law at issue was compatible with Article 9.[151] The Court then examined if the criteria set out by the French law – as implemented by local authorities – were compliant with Article 10 of the Directive and answered in the positive. Regarding Article 10(2)(b) thereof, it referred to its reasoning under Article 9 of the Directive, implicitly acknowledging that these provisions were redundant.[152]

The ruling in *Cali Apartments* was of great significance for European cities,[153] after *Airbnb Ireland* in which the Court had ruled that Airbnb provided an ISS thus shielding the platform from a series of obligations. Despite its very strict character,[154] the scheme adopted by City of Paris was deemed to comply with EU law, which paved the way for the referring court to uphold it.[155]

146 Joined cases C-724/18 et C-727/18, *supra* n. 26, para. 59.
147 *Ibid.*, para. 59.
148 *Ibid.*, paras 67–68.
149 *Ibid.*, paras 71–73.
150 *Ibid.*, para. 74.
151 *Ibid.*, para. 75.
152 *Ibid.*, para. 79. In this regard, it must be noted that, under Art. 9(1), 'Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied: […] (b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest; […]', while pursuant to Art. 10(2), 'The criteria referred to in paragraph 1 shall be: […] (b) justified by an overriding reason relating to the public interest; […]'.
153 Tania Pantazi, *Regulating Short-Term Rentals: Joined Cases C-724/18 and C-727/18* Cali Apartments, 28(4) Maastricht J. Eur. & Comp. L. 581 (2021).
154 Are conditioned to prior authorization the rental of a primary residence more than 120 days per annum and the rental of a secondary residence from one day per annum. Pursuant to the compensation requirement, the provider of the rental service must create on a market an accommodation of at least equivalent surface that is not rented for short period of times. In some areas, providers are required to double the surface.
155 Judgment of the Cour de cassation of 18 Feb. 2021, *Cali Apartments*, 17-26.156.

3.3.3 *Authorization schemes under the Treaty*

Authorization schemes must comply with several criteria under Article 49 TFEU. The latter are broadly similar to those set out in Directive 2006/123, which comes as no surprise since the Directive intended, inter alia, to codify existing case-law.[156]

3.4 Consequences for the regulation of composite platform economy services

As it was pointed out above, as EU law currently stands, a composite service may be classified as either (1) an overall online service, (2) an overall offline service, or (3) two independent services of offline and online nature, respectively.[157]

Regarding overall services, the current legal framework seems quite consistent. An overall online service falls within the scope of the very business friendly provisions of Directive 2000/31.[158] As for overall services in the field of transportation, such as UberPop, they are excluded from the scope of Directive 2006/123 and Article 56 TFEU. Consequently, Member States retain quite extended regulatory powers: Member States where they are provided may decide to regulate or ban them; and Member States where providers of such services are established may enforce objectively justified authorization schemes under Article 49 TFEU.

Regarding services that classify as two independent services of offline and online nature, however, the current legal framework appears to fall short of the mark. *Airbnb Ireland* is a good example of such shortcomings. In this case, the Court clarified that Airbnb only provides an online intermediation service from Ireland, while the underlying short-term accommodation rental services are, in fact, provided by local owners. This implies that while Airbnb's service benefits from the provisions of Directive 2000/31 – including the internal market clause thereof guaranteeing freedom to provide services in other Member States – Airbnb hosts may be subjected to strict authorization schemes under Article 15 of Directive 2006/123.

There is no denying that such schemes could potentially discourage local owners from engaging in short-term accommodation rental activities. After all, that is precisely what the procedure set out by the City of Paris aimed to achieve. Airbnb's business is obviously dependent on the owners' willingness to rent.[159]

156 *See* for instance, case C-463/13, *Stanley International Betting et Stanleybet Malta*, 22 Jan. 2015, EU:C:2015:25.

157 *See* Chapuis-Doppler & Delhomme, *Regulating Composite Platform Economy Services*, *supra* n. 7, at 411; *see also* Chapuis-Doppler & Delhomme, *Affaire Publicité et vente de médicaments en ligne (C-649/18, A)*, *supra* n. 7.

158 Case C-649/18, *supra* n. 5.

159 *See* for instance, regarding network effects in multi-sided markets, H. Shelanski, S. Knox & A. Dhilla, *Network Effects and Efficiencies in Multisided Markets* (2017), OECD DAF/COMP/WD(2017)40/FINAL.

Thus, restrictions imposed on Airbnb's actual or potential hosts may well thwart the provision of its online intermediation service.

Advocate General Szpunar had warned against this adverse effect in his Opinion in *Elite Taxi*: 'It would be pointless only to liberalise a secondary aspect of a composite supply if that supply could not be freely made on account of rules falling outside the scope of the provisions of Directive 2000/31'.[160] Consequently, it appears that the applicable legal framework fails to guarantee the freedom to provide composite platform economy services that classify as two independent services of online and offline nature.

4 CONCLUSION

In a series of recent cases, the Court was provided with the opportunity to clarify the legal framework applicable to ISS. Thus doing, it has noticeably strengthened the regulatory powers of Member States. It ruled that Member States may restrict the freedom of ISS providers established in another Member State through general measures, in defiance of the very clear provisions of Directive 2000/31. It also held that national measures aiming at including ISS in the scope of existing general authorization schemes are not prohibited by Article 4 of Directive 2000/31 and do not even need to be notified under Directive 2015/1535. Conversely, the Court only required from Member States that they notify measures regulating ISS provided from another Member State under Directive 2000/31 – be they general in nature or adopted prior to the entry into force of Directive 2000/31 – failing which such measures shall be unenforceable.

This modernization of the applicable legal framework to ISS is commendable – especially since it is likely that the Digital Services Act (DSA), which was expected to overhaul Directive 2000/31, leave the key provisions thereof untouched.[161] Nonetheless, this reshuffle creates a high degree of uncertainty for Member States wishing to regulate ISS in compliance with their notification obligations. Further, the current regime fails to guarantee the freedom to provide composite platform economy services that classify as two independent services of offline and online nature. This owes less to the Court's interpretation of the applicable provisions than to the way the Court construes the classification of composite services.

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160 Opinion of AG Szpunar in Case C-434/15, *Elite Taxi*, 11 May 2017, EU:C:2017:364, para. 31.

161 Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final.